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No. _____

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner*,

v.

GREGORY ESPARZA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court grant habeas corpus relief in a capital case, under the Antiterrorism and Effective Death Penalty Act (AEDPA), without determining that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law?

2. Has this Court clearly established that a state court's failure to correctly apply the state's capital sentencing statute constitutes a "structural" violation of the Eighth Amendment?

3. Does a state court violate clearly established federal law as determined by this Court by upholding a capital sentence where the trial court failed to instruct the jury on a specific aggravating factor supporting a capital sentence, but where the jury's verdict necessarily included a jury determination that the aggravating factor was present?

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In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner*,

v.

GREGORY ESPARZA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The United States Sixth Circuit Court of Appeals Opinion is attached as Appendix A. The United States District Court for the Northern District of Ohio's unreported Memorandum and Order are attached as Appendix C. The Ohio Sixth District Court of Appeals' unreported Opinion and Order in reconsideration proceedings and unreported Opinion and Order in State post-conviction proceedings are attached as Appendices D and E, respectively. The Supreme Court of Ohio's published decision and Order on direct

appeal appear at 39 Ohio St.3d 8 (1988). The Ohio Supreme Court's denial of Esparza's Motion for Rehearing appears at 39 Ohio St.3d 725 (1988).

JURISDICTION

The United States Court of Appeals issued its opinion on November 5, 2002. After this Court granted an Application for extension of time to file her petition from February 3, 2003 to March 5, 2003, the Warden timely filed her petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Ohio Revised Code, Title 29, Section 2929.04 provides, in pertinent part:

> (A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> (7) The offense was committed while the offender was committing . . . aggravated robbery . . . and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

INTRODUCTION

This petition presents important questions concerning the appropriate scope of federal court deference to state court criminal adjudications under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In particular, this petition seeks to resolve whether a federal appellate court may simply bypass the limitations set forth in the AEDPA, as the Sixth Circuit did below, and substitute its own judgment for that of the state court on a claimed constitutional error fully adjudicated in state court proceedings, even though the state court judgment was not contrary to, nor did it involve an unreasonable application of, clearly established federal law.

This Court has repeatedly recognized the importance of policing the appropriate boundary between state and federal court adjudication under the AEDPA. Indeed, in two recent cases, this Court granted a State's petition for writ of certiorari and summarily reversed where the appellate court had sought to circumvent the AEDPA by "substitut[ing] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." *Woodford v. Visciotti*, __ U.S. __, 123 S.Ct. 357, 360 (2002); *see also, Early v. Packer*, __ U.S. __, 123 S.Ct. 362 (2003). The State of Ohio respectfully urges the same result here.

In this case, the Sixth Circuit, in a 2-1 decision granting Esparza habeas relief, simply ignored the carefully crafted AEDPA mandate of deference to state court proceedings, and instead substituted its own judgment for that of the Ohio state courts, in determining that Esparza was entitled to habeas corpus relief. The sole error the Sixth Circuit panel identified in granting relief was the court's belief that the Ohio courts intentionally refused to comply with Ohio's capital sentencing law, and that this "refusal" violated the Eighth Amendment. In doing so, as the dissent noted, the majority "basically sideline[d]" AEDPA. *Esparza*

v. Mitchell, 310 F.3d 414, 425 (2002) (Suhrheinrich, J., dissenting). The majority further held, despite this Court's well-established guidelines to the contrary, that this alleged state law "error" was structural, and therefore not subject to harmless error analysis. *Id.* at 421-422. The unwarranted grant of relief in this case thus flouts both this Court's decisions and the statutory framework mandated by AEDPA. Perhaps equally troubling, the decision, as the dissent below points out, significantly erodes the respect for state courts that is at the very heart of AEDPA's limitations upon federal court habeas corpus authority.

Left undisturbed, the decision will seriously undermine Ohio's enforcement of its own capital sentencing law by nullifying numerous other capital sentences, regardless of whether there is any demonstrable prejudicial error. Additionally, because virtually all of the states' capital sentencing procedures were enacted consistent with this Court's decisions, the wide scope of the panel majority's holding will elevate countless alleged violations of state statutes to the status of Eighth Amendment violations cognizable on habeas.

Finally, the panel majority's decision creates a conflict in the federal circuits regarding the type of error subject to harmless error analysis. The opinion below directly conflicts with both a Ninth Circuit decision, which rejects an identical argument by a capital petitioner, and an Eighth Circuit decision which applies harmless error analysis in identical circumstances to those presented here.

Because the Sixth Circuit's opinion represents an unwarranted departure from this Court's well-established doctrine, as well as the decisions of its sister Circuits, on these important issues of constitutional and statutory law, the Warden respectfully requests the Court to grant her petition and reverse the Sixth Circuit's grant of habeas corpus.

STATEMENT OF THE CASE

On the night of February 12, 1983, a lone gunman entered the Island Variety Carryout in Toledo, Ohio, rifled the cash register, and shot and killed clerk Melanie Gerschultz. Following an investigation, the state indicted Gregory Esparza for aggravated felony murder, i.e., purposefully killing Ms. Gerschultz while committing aggravated robbery. The indictment alleged, as a specification to the felony murder count, that Esparza committed the aggravated felony murder while in the course of committing armed robbery. The front page of the indictment expressly stated that the count alleging aggravated felony murder included a death penalty specification. Esparza raised no pretrial objections to the wording of the indictment, and the case proceeded to trial as a capital case.

The prosecution's primary witness was Esparza's sister, who testified that Esparza admitted to her that he had committed the robbery and murder. At the close of the trial, the court specifically instructed the jury that, to find Esparza guilty of aggravated felony murder and the capital specification, it was required to find, beyond a reasonable doubt, that Esparza purposefully killed Ms. Gerschultz while committing aggravated robbery. Because neither party presented evidence that anyone other than Esparza shot and killed Ms. Gerschultz, the court did not instruct the jury on accomplice liability. The jury then convicted Esparza, finding him guilty beyond a reasonable doubt on the aggravated felony murder count with the attendant capital specification. Following a separate penalty hearing, the jury recommended, and the court imposed, a capital sentence.

Since that time, Esparza has exhaustively litigated claimed "errors" associated with his trial, his sentence, and his appeals. At the Ohio Supreme Court level during his direct appeal, for instance, Esparza asserted fourteen separate

claims of error, each of which the court denied. In November 1989, Esparza instituted state post-conviction proceedings, setting forth fifty separate alleged errors. The trial court found none of these meritorious. In his appeal from denial of post-conviction relief, he claimed fifteen separate errors, including multiple separate alleged violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. The state appellate court rejected each of these. Following denial of his post-conviction appeal, Esparza moved to reopen his direct appeal, citing sixteen new "errors." Again, after considering Esparza's claims, the state court denied his request.

With regard to the specific "error" on which the Sixth Circuit relied in granting habeas relief below—namely, Ohio's alleged failure to follow its own statutes in sentencing Esparza to death—state courts have adjudicated the claim on the merits, not merely once, but *twice*. First, in his post-conviction proceedings, Esparza "raised the issue of the legality of his sentence." *State v. Esparza*, unpublished opinion, Ohio Sixth District Court of Appeals, No. L-90-235 (May 29, 1992), Appendix E at 281a. In particular, he alleged "he was not convicted of an offense for which the death penalty could be imposed in Ohio" because the state had failed to allege in the indictment that Esparza was the "principal offender" (i.e., the person who actually killed Melanie Gerschultz).[1] *Id.* The state court considered and rejected this claim on the merits, concluding both that "where only one defendant is named in an indictment alleging felony murder, it would be redundant to state that the defendant is being charged as the principal offender," and that, in any event, Esparza had "notice of all the elements with which he [was] charged." *Id.* at 284a.

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[1] Acting as a "principal offender" (i.e., the "actual killer) in a felony murder is an aggravating circumstance under Ohio's capital sentencing statutes. *See* OHIO REV. CODE § 2929.04(A)(7) (Baldwin 2003).

Esparza subsequently made an explicit Eighth Amendment challenge to his capital sentence in seeking to reopen his direct appeal. According to the first of the sixteen assignments of error he asserted in his papers:

> ASSIGNMENT OF ERROR NO. 1
> APPELLANT ESPARZA'S DEATH SENTENCE IS VOID AND VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State v. Esparza, unpublished opinion, Ohio Sixth District Court of Appeals, No. L-84-225 (July 27, 1994), Appendix D at 246a. The state court once again considered Esparza's challenge to his capital sentence on the merits, and once again rejected it. *Id.* at 250a-265a.

In September 1996, Esparza filed a habeas petition asserting fifty-six claimed errors with the United States District Court for the Northern District of Ohio. *Esparza v. Anderson*, unpublished, Case No. 3:96 CV 7434 (N.D. Ohio October 13, 2000), Appendix C at 53a-61a. Among this litany of alleged errors was Esparza's rehashed state court claim that the capital sentence was unconstitutional because the indictment and the jury instructions failed to include the language that he was "the principal offender in the commission of the aggravated murder . . . ." *Id.* at 133a.

Recognizing that the Antiterrorism and Effective Death Penalty Act (AEDPA) applied to Esparza's request, the District Court noted Esparza was required to show that the Ohio appellate court's rejection of his claim was contrary to, or involved an unreasonable application of, clearly established federal law as set forth by this Court's decisions. *Id.* at 61a-62a. In granting habeas relief, the District Court reasoned that the Ohio appellate court's denial of relief in

May 1992 "ran afoul" of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case decided *eight years after* the Ohio appellate court's denial of relief. *Id.* at 140a. However, at no point in its opinion did the District Court explain how the state appellate court's decision was an unreasonable application of clearly established federal law. The District Court relied instead on its own individual interpretation of this Court's decisions announced nearly a decade after the state appellate court decision at issue.

In a split decision, the Sixth Circuit affirmed the District Court's judgment. Although the State argued that the District Court misapplied AEDPA in granting relief, the panel majority simply ignored the AEDPA statute, and failed to even address whether the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law.[2] *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), Appendix A. Instead, the Sixth Circuit concluded that, in sustaining Esparza's death sentence, the Ohio courts failed to correctly apply Ohio's capital sentencing statute, and that the perceived failure was "unquestionably a violation of the Eighth Amendment." *Id.* at 12a. The majority then determined that under *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and this Court's seminal

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[2] As described below (*see* Section I.B.), rather than articulating a "clearly established federal law" the majority opinion merely strung together a dissent by Justice Scalia in one case, a concurrence by Justice Breyer in another, both of which were decided well after Esparza's conviction became final, and an opinion by Chief Justice Rehnquist to announce a newly-discovered "fundamental principle of modern death penalty jurisprudence" that apparently provides "that jury sentencing in capital cases is mandated by the Eighth Amendment." *Esparza*, 310 F.3d at 420 (quoting Justice Breyer concurring in *Ring*, 122 S.Ct. at 2446).

Eighth Amendment decisions, the state courts' failure to correctly apply state law amounted to structural, rather than harmless, error.[3] *Id.* at 13a-15a.

The State now seeks certiorari to address the inconsistencies between the AEDPA analysis applied below, and that mandated by the plain language of the statute, the clear mandate of this Court's opinions, and the approach of sister Circuits on these issues.

REASONS FOR GRANTING THE WRIT

I. BY GRANTING HABEAS CORPUS RELIEF, THE SIXTH CIRCUIT VIOLATED THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, 28 U.S.C. SECTION 2254(d)(1).

A. AEDPA Mandates Federal Court Deference To State Court Criminal Adjudications.

Because Esparza filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs his petition. *Lindh v. Murphy*, 521 U.S. 320, 336-338 (1997). The relevant portion of that act, 28 U.S.C. Section 2254(d)(1), states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States . . . .

As the cited language demonstrates, AEDPA demands federal court deference to state court criminal adjudications. Under AEDPA, the question presented to a federal court on habeas review is not merely whether the state court erred in its criminal adjudication. Indeed, as this Court recently noted, once a state court has adjudicated an issue on the merits, even if the state court "failed to apply" the clearly established law of this Court, that failure would not justify habeas relief. *Early v. Packer*, __ U.S. __, 123 S.Ct. 362, 363 (2002). Rather, habeas relief is appropriate *only if* the petitioner meets the "more demanding requirement" of showing that the state court adjudication was "contrary to" or an "unreasonable application of" such law.[4] *Id.* at 366. Moreover, in making such a determination, the federal court may consider only that Supreme Court federal law that was "*clearly established at the time his state-court*

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[3] The Sixth Circuit declined to address the district court's determinations that Esparza's trial counsel was constitutionally ineffective throughout the sentencing phase, and that such ineffectiveness was "induced" by the trial judge's denial of a defense motion to continue the sentencing hearing, and that Esparza was prejudiced by "cumulative" error.

[4] This Court has held that, under AEDPA, for purposes of habeas review, a state court adjudication is "contrary to" clearly established Supreme Court precedent only if either "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or the "state court decide[d] a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). The category of "unreasonable application," on the other hand, is strictly limited to those situations where "the state court identifies the correct legal principle from [the Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

conviction became final." *Williams*, 529 U.S. at 390 (emphasis added).

Importantly, a federal court cannot avoid the congressionally-imposed limitations expressed in AEDPA simply by couching its opinion in terms of "constitutional" or "structural" error. Rather, before even reaching the constitutional error analysis, and any attendant issues regarding the effect, if any, of that error on the verdict, a federal court must *first* make the threshold finding that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court law. *Early*, __ U.S. __, 123 S.Ct. at 366. *See also*, *Williams*, 529 U.S. at 410.

AEDPA thus acts to restrict the scope of federal court review of state court criminal proceedings. It is no longer sufficient for a federal court merely to conclude that the state court erred, or even that it "unquestionably erred," for not all state court errors are cognizable under AEDPA. Rather, an error is AEDPA-cognizable only if it reaches the "more demanding requirement" of reflecting a state court determination "contrary to" or an "unreasonable application of" clearly established federal law as articulated by this Court. *Early*, __ U.S. __, 123 S.Ct. at 366.

B. The Sixth Circuit's Habeas Analysis Simply Ignores AEDPA's Clear Mandate.

In this case, the panel majority simply ignored AEDPA's carefully-crafted statutory framework in granting Esparza habeas relief. The majority opinion allows for no other conclusion, as it does not even mention section 2254(d)(1)'s standard of deference, or any other aspect of AEDPA, in reference to Esparza's defective indictment and instruction claims. Sadly, the lower court's failure even to mention AEDPA is entirely consistent with its failure to

employ the AEDPA-mandated analysis. The court, for instance, made no attempt to even articulate what constituted the requisite "clearly established federal law" at the time Esparza's conviction became final, let alone reach a determination that the state court adjudication was "contrary to" or "an unreasonable application of" that law.

Rather than identifying "clearly established" federal law, the lower court instead explicates what it calls a "fundamental principle of modern death penalty jurisprudence" that it creates from whole cloth by stitching together a dissent by Justice Scalia in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a concurrence by Justice Breyer in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), both decided well after Esparza's conviction became final, and an opinion by Chief Justice Rehnquist in *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Taken together, these cases apparently provide, in the court's view below, "that jury sentencing in capital cases is mandated by the Eighth Amendment." *Esparza*, 310 F.3d at 420 (quoting Justice Breyer concurring in *Ring*, 122 S.Ct. at 2246). Importantly, the panel majority does not even purport to claim that this "fundamental principle" counts as "clearly established law" for AEDPA purposes, and its reliance on decisions that post-date, by years, the finality of Esparza's conviction convincingly demonstrates that it could not make any such claim. *See Williams*, 529 U.S. at 390 (for AEDPA purposes, a federal court can look only to that federal law clearly established at the time the conviction became final).

Moreover, even if the Sixth Circuit had articulated a clearly established rule of law, it made no determination that the state court ruling was "contrary to" or "an unreasonable application of" that rule. In fact, the words "unreasonable" and "contrary" do not appear at all in reference to the state appellate court's denial of Esparza's defective indictment and instructions claims. Rather, the court merely asserted its own

vision of the Eighth Amendment, and held that the state court adjudication was "unquestionably a violation" of Esparza's Eighth Amendment rights thus construed. *Esparza*, 310 F.3d at 420. That is, the majority opinion *begins and ends* with its finding that the state courts committed Eighth Amendment error. "[B]ut that inquiry would have been proper only if [the majority] had first found (pursuant to the correct standard) that the [Ohio Court of Appeals'] decision was 'contrary to' clearly established Supreme Court law—which it did not and could not." *Early*, __ U.S. __, 123 S.Ct. at 366.

Like the Ninth Circuit in *Early v. Packer* and *Woodford v. Visciotti*, the panel majority erred by granting habeas corpus relief based solely on substituting its own independent judgment of constitutional error for that of the state court. The panel majority's analysis is more than a mere failure in articulation, or misapplication of a statute; rather, it is a declaration by the panel majority that the AEDPA is irrelevant where the state court has committed what the *federal court believes* is constitutional error. *See Williams*, 529 U.S. at 404 (failure to apply test of objective reasonableness would amount to conclusion that section 2254(d) has no effect on prior law). As such, the panel majority's relief, indeed its entire habeas approach, is fundamentally flawed and must be reversed.

C. Under The AEDPA-Mandated Habeas Framework, There Was No Basis For Relief.

A closer analysis of the alleged "error" underlying the lower court's grant of habeas relief further demonstrates the inappropriateness of that relief. The sole "error" on which the Sixth Circuit relied was the lack of "principal offender" language in the indictment and corresponding jury instructions, an "error" that both the Sixth Circuit and the district court agreed had been adjudicated on the merits in

state court. *See Esparza*, 310 F.3d at 420-422; *Esparza v. Anderson*, unreported, Case No. 3:96 CV 7434 at 74 (N.D. Ohio October 13, 2000). Thus, as described above, under AEDPA as properly applied, the conviction and sentence must stand unless the state court adjudication on this issue was "contrary to" or an "unreasonable application of" Supreme Court precedent. Esparza cannot make any such showing here.

The most generous reading of the decision below is that it found that the state court adjudication of Esparza's "principal offender" issue violated the Eighth Amendment for three separate reasons: (1) because the state court deliberately misapplied state law; (2) because even if the state court had not deliberately misapplied state law, the failure of the indictment and the jury charge to contain the "principal offender" language was an independent Eighth Amendment violation; and (3) because the state court inappropriately used a harmless error analysis, rather than a structural error analysis, in assessing the import of failing to include the "principal offender" language. *See Esparza*, 310 F.3d at 421-422. None of these three reasons, however, demonstrate "error," let alone error that qualifies under AEDPA's "contrary to" or "unreasonable application of" threshold.

1. The Sixth Circuit's Determination That The State Court "Deliberately Misapplied" State Law Provides No Basis For Relief On Federal Habeas Review.

In upholding Esparza's conviction and sentence, the state court did not misapply state law, deliberately or otherwise, nor would its alleged "misapplication" amount to constitutional error in any event. Ohio Revised Code section 2929.04(A)(7) provides that aggravated murder committed

during the course of specified aggravated felonies, among them aggravated robbery, is punishable by death. This Court has repeatedly held that purposefully killing another during the course of an aggravated robbery alone is sufficient to satisfy the Eighth Amendment's "narrowing" requirement. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (Eighth Amendment narrowing function can be satisfied either by providing for separately charged "aggravators" or by defining the elements of the crime in a sufficiently narrowing fashion). Ohio goes further than constitutionally required by limiting those felony murderers who are eligible for capital punishment to the "principal offender" or those who act with "prior calculation and design." OHIO REV. CODE § 2929.04(A)(7) (Baldwin 2003). But, any claim of error predicated upon the state court's alleged failure to apply this state statute further narrowing the class, is necessarily, at most, a state law error, not a constitutional error subject to habeas review under AEDPA.

As a matter of state law, however, the Ohio Supreme Court has held that failure to include the "principal offender" language in the indictment or jury instructions is not reversible error where there was no evidence that the murder was committed by more than one person, and, therefore, the defendant "was either the principal offender, or he committed no offense at all." *State v. Bonnell*, 61 Ohio St.3d 179, 184 (1991); *see also, State v. Biros*, 78 Ohio St.3d 426, 436-439 (1997) (describing omission of "principal offender" language as a "technical error" where evidence indicated that only one person committed the crime). If the Ohio Supreme Court's construction of section 2929.04(A)(7) is accepted—as it must be in federal habeas corpus proceedings—then "the constitutional violation found by the [panel majority] dissolves." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Therefore, the panel majority's finding of *constitutional* error, based on its determination that the state courts misapplied Ohio's sentencing law, is clearly erroneous.

2. The Panel Majority Erroneously Granted Relief Based On Its Opinion That The Ohio Courts Failed To Comply With This Court's Sixth And Eighth Amendment Precedent.

Notwithstanding the lower court's incorrect analysis of state law, had the panel majority properly applied the AEDPA framework, it could not possibly have concluded that this Court's "clearly established" law required overturning Esparza's death sentence. In fact, not only did the panel majority fail to determine that the state appellate court's decision was an unreasonable application of this Court's precedent, it incorrectly applied this Court's precedent to manufacture habeas relief for Esparza.

A simple review of Supreme Court decisions clearly reveals that this Court has *never* held that indictment by a grand jury is constitutionally required in a state criminal proceeding, much less that the Eighth Amendment requires an indictment setting forth an aggravating circumstance in strict conformity with the state's capital sentencing statute. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (the Fourteenth Amendment to the Constitution "has not, however, been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'"). The panel majority's suggestion that the Ohio Courts were wrong in finding otherwise is bewildering.

Here, the indictment provided Esparza with abundant notice that he was being charged with a capital offense. In fact, the Ohio appellate court found that the indictment contained a valid capital specification under Ohio law (noting that the words "capital specification as to the first count" appeared on the front of the indictment), and neither the

district court, nor the panel majority found this determination to be unreasonable. Moreover, this Court has issued no decisions signaling to the Ohio appellate courts the need to grant Esparza relief years later in post-conviction proceedings, based on his defective indictment claim. *See United States v. Cotton*, 535 U.S. 625 (2002) (omission from a federal indictment of a fact that enhances the statutory maximum sentence did not justify an appellate court vacating the enhanced sentence, where the defendant did not object in the trial court). Regardless, the jury most certainly found the only *fact* necessary to sentence Esparza to death—that he killed Ms. Gerschultz during the course of the robbery.

The panel majority's holding that Ohio courts should have recognized an Eighth Amendment right to jury sentencing, based on this Court's jurisprudence, is also simply wrong. *See Esparza*, 310 F.3d at 421-422. This Court has never recognized an Eighth Amendment right to jury sentencing in a capital case. The panel majority reasoned that Justice Breyer's concurring opinion in *Ring v. Arizona*, combined with the dissenting opinion of Justice Scalia in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and the Court's opinion in *Lowenfield*, 484 U.S. 231, compels the conclusion "that jury sentencing in capital cases is mandated by the Eighth Amendment." *Esparza*, 310 F.3d at 420 (quoting *Ring v. Arizona*, 122 S.Ct. at 2446). However, the panel majority blatantly ignored the concurring opinion of Justice Scalia in *Ring*, in which he expressly disavows Justice Breyer's Eighth Amendment analysis. *Ring v. Arizona*, 122 S.Ct. at 2445 ("While I am, as always, pleased to travel in Justice Breyer's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original). In short, this Court has never recognized such a right, and it is certainly not clearly established federal law for AEDPA purposes.

3. It Was Not Constitutional Error For The State Court To Use Harmless Error Analysis Rather Than Structural Error Analysis With Regard To The Alleged Defects In The Indictment And Instructions.

In perhaps its most egregious misapplication of this Court's jurisprudence, the panel majority condemns the state appellate court for failing to treat the alleged indictment and instruction error (i.e., the state court's decision to uphold the capital sentence despite the lack of express "principal offender" language in the indictment and instructions) as a "structural" violation of the Eighth Amendment. *Esparza*, 310 F.3d at 421-422. This Court has recognized only a handful of errors as "structural." *See Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993) (defective reasonable doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986) (racial discrimination in grand jury); *Waller v. Georgia*, 467 U.S. 39, 48-50 & n.9 (1984) (denial of public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased judge). As Judge Suhrheinrich correctly notes in dissenting below, the "structural error" identified by the panel majority is not on this list. *Esparza*, 310 F.3d at 429 (Suhrheinrich, J., dissenting). Consequently, the state courts' unwillingness to treat this trial error as structural error is certainly not contrary to any decision of this Court in which a "structural error" has been identified.

In fact, in a variety of contexts, this Court consistently treats this type of error—whether viewed as an error in the instructional definition of the statutorily prescribed aggravating circumstance, or a complete omission of instruction on a required "element"—as trial error subject

to *harmless error* analysis. *Neder v. United States*, 527 U.S. 1, 7 (1999); *Johnson v. United States*, 520 U.S. 461 (1997); *California v. Roy*, 519 U.S. 2, 5 (1996) ("This Court has written that 'constitutional error' of the sort at issue . . . is a 'trial error,' not a 'structural error'"); *Pope v. Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense). Furthermore, where it is apparent, as it is here, that the jury's verdict was the "functional equivalent" of a finding on the disputed element, the Court unanimously finds harmless error. *See California v. Roy*, 519 U.S. at 6 (Scalia, J., concurring). As such, it was the Sixth Circuit panel below, not the state appellate court, that misapplied clearly established federal law by finding structural error in the face of repeated holdings by this Court that such error is subject to harmless error analysis.

Under AEDPA's basic framework, the state courts simply did not act in objectively unreasonable fashion by determining there was no prejudice to Esparza's fundamental rights. The district court and the panel majority pointed to no indications of prejudice in the record. Indeed, the district court found that the failure to instruct the jury on the terms of the statutory definition was "inconsequential" to the verdicts. *Esparza v. Anderson*, unpublished, Case No. 3:96 CV 7434 (N.D. Ohio October 13, 2000) at 63. Moreover, the panel majority denied Esparza's claim that his trial counsel was ineffective in not objecting to the defective indictment, because Esparza could not make the requisite showing of prejudice.[5] *Esparza*, 310 F.3d at 423. As a result, the lower courts' findings of "structural error" were not at all based on the possible effect of the error. Rather, the district court and

[5] The panel majority even speculated that Esparza's trial counsel intentionally decided not to object because the defect in the indictment could have been easily remedied by the State without endangering Esparza's further prosecution.

the panel majority impermissibly transformed a technical mistake in drafting into a constitutional "structural error."

In sum, the Sixth Circuit ventured beyond this Court's precedents to find a new type of "structural error." That the Sixth Circuit did so in a habeas corpus case governed by the AEDPA—and based on a supposedly incorrect application of Ohio's death penalty statutes by the Ohio courts—is staggering. The State has consistently maintained that the Ohio appellate court's denial of Esparza's claims is neither *contrary to*, nor an *unreasonable application* of, clearly established federal law as defined by the decisions of this Court; and the Sixth Circuit neither considered, nor discovered, any law suggesting otherwise. As noted by Judge Suhrheinrich in dissent, the Sixth Circuit majority "basically sidelined" AEDPA on its way to correcting what *it* perceived as the state court's failure to *correctly* apply *state law*. *Esparza*, 310 F.3d at 425 (Suhrheinrich, J., dissenting). As a result, the panel majority's decision in this case is the polar opposite of the Congressional intent codified by AEDPA.

II. THE SIXTH CIRCUIT'S ERRONEOUS HABEAS FRAMEWORK IS INCONSISTENT WITH THAT EMPLOYED IN OTHER CIRCUIT COURTS, IMPROPERLY INTERFERES WITH STATE COURT ENFORCEMENT OF STATE CAPITAL SENTENCING STATUTES,

AND INJECTS SUBSTANTIAL CONFUSION INTO DEVELOPING FEDERAL HABEAS DOCTRINE UNDER AEDPA.

A. The Panel Majority's Habeas Analysis Below Directly Conflicts With The Habeas Analysis Applied In Other Federal Circuit Courts.

The court's opinion below sows the seeds of confusion in federal habeas doctrine by directly conflicting with other circuit courts in two distinct, but equally important, ways. First, the entire federal habeas framework reflected in the opinion below is directly contrary to the habeas framework employed by courts in the First, Second, Third, Fourth, Fifth, Eighth and Tenth Circuits. Second, the Sixth Circuit's determination that the alleged Eighth Amendment violation at issue in this case is a "structural error" not subject to harmless error analysis directly conflicts with decisions in both the Eighth and Ninth Circuits.

As to the first of these conflicts, circuit courts across the country have expressly recognized the importance of beginning their post-AEDPA habeas analyses by first reviewing the state court decision to determine if it was, in fact, "contrary to, or an unreasonable application of, clearly established federal law." *Mountjoy v. Warden*, 245 F.3d 31, 35 (1st Cir. 2001); *Fuller v. Gorczyk*, 273 F.3d 212, 218 (2d Cir. 2001); *Frye v. Lee*, 235 F.3d 897, 903 (4th Cir. 2000); *Santellan v. Cockrell*, 271 F.3d 190, 192 (5th Cir. 2001); *Valdez v. Ward*, 219 F.3d 1222, 1229 (10th Cir. 2000). These circuits have each held, in effect, that "even where a state court made a mistake, . . . we are determining the reasonableness of the state court's 'decision,' . . . not grading their papers." *Santellan*, 271 F.3d at 193 (quoting *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001)). *See also Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999); *Matteo v.*

Superintendent, 171 F.3d 877, 891 (3d Cir. 1999) (*en banc*); *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999) (holding that, in the AEDPA context, courts "cannot grant relief unless the state court's result is legally or factually unreasonable").

So, for instance, in *Long v. Humphrey*, 184 F.3d 758 (8th Cir. 1999), in granting habeas relief, the court began by locating a "clearly established rule of federal law identified by the Supreme Court;" in that case, the rule that when a trial court orders a mistrial over the defendant's objection, double jeopardy bars a retrial unless there was manifest necessity for the mistrial. *Id.* at 759 (quoting *Arizona v. Washington*, 434 U.S. 496, 503-505 (1978)). The Eighth Circuit then separately, and expressly, determined that the state court's action had been "an unreasonable application of" the clearly established law identified by the Supreme Court in *Washington*. *Id.* at 761. Only because it found both a "clearly established rule" and state court action constituting "an unreasonable application of" that rule, did the Eighth Circuit grant federal habeas relief.

Here, by contrast, instead of using the AEDPA-mandated approach, the Sixth Circuit incorrectly framed the issue as whether the District Court was correct in concluding that the State courts had committed Eighth Amendment "error." *Esparza*, 310 F.3d at 420. In performing its analysis, the Sixth Circuit, in essence, announced its own idiosyncratic view of Eighth Amendment requirements and then "graded the state court's papers" against that standard—the exact approach that other circuits have cautioned their lower courts to avoid.

With regard to the second conflict identified above, the Sixth Circuit's determination that the alleged Eighth Amendment error was "structural" directly conflicts with decisions in both the Eighth and Ninth Circuits. In *Williams*

v. Calderone, 52 F.3d 1465, 1475-1477 (9th Cir. 1995), the Ninth Circuit directly addressed whether the failure to include a death penalty special circumstance in the jury instructions was trial error susceptible to harmless error analysis or instead constituted structural error, and it expressly determined that such errors are *not* structural. Similarly, in *Johns v. Potosi*, 203 F.3d 538, 543-545 (8th Cir. 2000), the Eighth Circuit applied harmless error analysis to the state court's alleged failure to instruct on a necessary finding that the defendant personally deliberated before committing capital murder. The Sixth Circuit's finding of structural error here with regard to the alleged failings in the instructions thus directly conflicts with both *Williams* and *Johns*, and creates disagreement among the circuits on the appropriate standard of error to be used in capital cases where Eighth Amendment violations are at issue.

The Sixth Circuit's erroneous opinion thus creates direct conflicts on two important questions of federal habeas law. The failure to correct the Sixth Circuit's approach will further muddy an area of the law, federal habeas corpus, that is already exceedingly complex. *See Edwards v. Carpenter*, 529 U.S. 446, 456 (2000) (Stevens, J., concurring).

B. The Unwarranted Relief Ordered Below Upsets The Balance Of Federalism And Interferes With States' Enforcement Of Their Capital Sentencing Statutes.

As a result of its improper application of this Court's decisions, the Sixth Circuit opinion seriously undermines the ability of the States to enforce their capital sentencing statutes. The panel majority concluded that a State cannot be "allow[ed] . . . to construct a constitutionally valid death penalty statute that . . . permits judges to ignore the statute in order to impose the death penalty." *Esparza*, 310 F.3d at 421. The majority reasoned that the Ohio appellate court

deliberately excused the "fact" that Esparza was not indicted for, and convicted of, a capital offense under Ohio law. Such readiness to impute error to the state court is simply "incompatible with [AEDPA's] highly deferential standard for evaluating state court rulings," and "inconsistent with the presumption that the state courts know and follow the law" *Woodford v. Visciotti*, __ U.S. __, 123 S.Ct. 357, 360 (2002) (internal citations and quotation marks omitted). By attributing deliberate ignorance of the law to the Ohio Court of Appeals, the panel majority upsets the federal-state judicial balance Congress mandated, and ultimately delivers a devastating blow to the respect owed state courts by their federal counterparts.

The negative consequences of the panel majority's decision will extend far beyond vacating Esparza's sentence. The Ohio Supreme Court, for instance, in at least four other capital cases, held that absence of the "principal offender" language in the indictment and jury instructions is a "technical error," subject to harmless error analysis. *See State v. Biros*, 78 Ohio St.3d 426 (1997); *State v. Joseph*, 73 Ohio St.3d 450 (1995); *State v. Bonnell*, 61 Ohio St.3d 179 (1991); and *State v. Noling*, 98 Ohio St.3d 44 (2002). The decision below may well result in automatic reversal of the capital sentences in those cases. Furthermore, the wide scope of this newly recognized species of "structural error," which, according to the panel majority's sweeping language, includes all "deviation" from state statutes adopted to comply with the Eighth Amendment, will undoubtedly result in many more claims of "structural" violations of the Eighth Amendment. These additional claims of "structural" error will result in even more needless turmoil, both in Ohio's courts and in the courts of other states.[6] It is vital for this

[6] In at least three other cases, the Ohio Supreme Court held that other alleged instructional errors implicating the "principal offender" language (*e.g.*, that the instructions failed to inform the jurors that they had to

Court to grant the Warden's petition here in order to protect the states' well-settled rights to create and maintain their own capital sentencing schemes.

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition and reverse the Sixth Circuit's decision.

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unanimously find whether the defendant was the "principal") were harmless error. *See State v. Moore*, 81 Ohio St.3d 22 (1998); *State v. Cook*, 65 Ohio St.3d 516 (1992); *State v. Frazier*, 61 Ohio St.3d 247 (1991).